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Civil Rights Commission Releases Plan To Promote Diversity In Compliance With Proposal 2

Lansing, MI – Today the Michigan Civil Rights Commission voted to adopt a Report that examines the impact of Proposal 2 on Michigan, and makes recommendations for continuing to promote diversity and equal opportunity in compliance with the constitutional amendment. The Report was created in response to Governor Granholm's Executive Directive 2006-7, charging the Commission with investigating the impact of Proposal 2 on the state's efforts related to diversity and equal opportunity.

"We believe this Report represents a solid plan for promoting diversity in a manner that complies with Proposal 2," said Commission Chair Mohammed Abdraboh. "Our state's businesses need a diverse, culturally competent and highly educated workforce to compete in the global economy, while the voters have clarified that preferences based solely on race or gender are not the means of achieving diversity. This plan merges both interests into what's best for Michigan."

The Report is the result of three months of investigation, including meetings with other state departments, a detailed review of relevant state statutes, and a review of best practices in other states. Also included in the Report are recommendations that provide a roadmap for continued promotion of diversity by means within the constitutional limitations.

"With this Report, the Commission and Department confirm that Proposal 2 does not mean the end of equal opportunity or diversity in Michigan," said Linda V. Parker, Director of the Michigan Department of Civil Rights. "Proposal 2 was a clear objection to one method of securing diversity and equal opportunity. We believe that the goal of promoting diversity and the message behind Proposal 2 are not mutually exclusive."

The Report, which was adopted by the Commission today, was presented to the Governor, immediately following the Commission's vote. The Report, along with a Fact Sheet and Executive Summary will be available on the Department's website following the Commission's meeting. For more information on the Civil Rights Commission or Department of Civil Rights, visit <http://www.michigan.gov/mdcr> or call 1-800-482-3604.

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“Just as we seek diversity in our economy, we must embrace human diversity in our communities, schools and workplaces. There’s no question, diversity matters. It defines the global marketplace. When we bring together people of different backgrounds and different ways of seeing the world, we spark innovation...and innovation creates huge dividends. If we fully embrace the mosaic that is Michigan, our diversity will help fuel our economic transformation. And do you know what else? As we face these economic tides, we have to remember that we are all in this state together. We did not arrive here in the same way or at the same time, but we are all here together, headed toward the same destination. We are One Michigan.”

Honorable Jennifer M. Granholm
Governor, State of Michigan
State of the State Address, February 6, 2007

EXECUTIVE SUMMARY

By Executive Directive 2006-7, Jennifer M. Granholm, Governor of the State of Michigan, directed the Michigan Civil Rights Commission to investigate the impact of the adoption of Proposal 06-02, issue a report detailing its findings, and offer specific recommendations. See Executive Directive 2006-7, (Attachment 1). The MCRC carried out this task of reviewing Proposal 2 and its application to state government through the Michigan Department of Civil Rights (“MDCR”) (Attachment 2). This Report is the result of three months of investigation, including in-depth meetings with seventeen (17) state departments,¹ six (6) other state agencies, contact with the Michigan Council for University Presidents, a detailed review of state statutes which mention key terms, and a review of best practices in other states.

¹ The Department of State declined an interview, and the Department of Attorney General did not respond to our request for an interview.

This Report does not constitute legal advice. It is the Michigan Civil Rights Commission's ("MCRC") policy response to the Governor pursuant to Executive Directive No. 2006-7. Final decisions on the application of Proposal 06-02 must be done on a case-by-case basis in consultation with legal counsel.²

That being said, the MCRC was established under Article V, Section 29 of the Michigan Constitution as a quasi-judicial body with the authority to investigate alleged instances of discrimination against any person in the enjoyment of civil rights guaranteed by law, to make legal findings, award damages when appropriate, and to secure the equal protection of the laws without discrimination.

At the outset, we make the following findings:

1. We believe, based on our reading of the amendment, that Proposal 2 does not eliminate *all* affirmative action and affirmative action programs but only those that grant preferential treatment based on race, sex, color, ethnicity, and national origin in the operation of public employment, public education, and public contracting.
2. Proposal 2 does not end equal opportunity or the critical pursuit of diversity and inclusion in the State of Michigan. Neither does it mean that the terms "race" or "sex" are banished from the official state vocabulary, as it relates to the state's decision-making process. This latter point was in fact acknowledged by proponents of Proposal 2 during the campaign to place the initiative on the Michigan ballot. The Michigan Civil Rights Initiative ("MCRI"), the key proponent organization of Proposal 2, wrote the following on its webpage made available to Michigan voters during the campaign, on a page titled "Big Myths about MCRI,"³

"(1) Myth: MCRI 'ends all affirmative action.'

(2) Fact: MCRI makes it unconstitutional to pick winners and losers based **solely** on race and sex." (emphasis added)

This statement by MCRI, in our view, indicates that race and sex may still be used under certain circumstances. If this were not the case, Proposal 2 could, and still may be, struck down by the courts as placing an unconstitutional burden on protected groups seeking

² For state agencies, that would be the Department of Attorney General.

³ Big Myths About MCRI, MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE, available at, <http://www.Michigancivilrights.org/media/MCRI-Myths.pdf> (last visited Feb. 9, 2007).

beneficial legislation.⁴ There is legal precedent from the U.S. Supreme Court that race and sex may be used as one of a number of factors in the state's decision-making process, if the objective serves a compelling state interest, such as diversity in higher education, and is narrowly tailored to achieve the objective sought.⁵ We do not believe that Proposal 2 has overturned the referenced U.S. Supreme Court precedent.

3. The ballot language for Proposal 2 stated that it would ban affirmative action programs that gave preferential treatment to groups or individuals based on race, sex, color, ethnicity, or national origin. The amendment is titled "Affirmative Action," however, the text of the new amendment does not reference the terms "affirmative action" or "affirmative action plans." Many affirmative action plans or programs do not contain preferences and would therefore not be in violation of Proposal 2. (See Section II (B), herein.)
4. The term "preferential treatment" is new to Michigan constitutional law, unlike the term "discrimination" which is well-settled by Michigan courts. "Preferential treatment" will be subject to continuing judicial review.
5. MDCR met with seventeen state departments and six other state agencies. As a result, it has been determined that none of these state departments or agencies, with the exception of Michigan Department of Transportation (MDOT) and Michigan Department of Environmental Quality (DEQ) uses an affirmative action program or plan that grants "preferential treatment" in its employment or contracting decisions. Both MDOT and DEQ have federal contracts that require the use of affirmative action programs.
6. The MDCR reviewed 45 state programs relating to the operation of public employment, public education, and public contracting that may be affected by the adoption of Proposal 2. As a result of this review, we believe eight (8), or 18% of the programs may be in jeopardy. The programs are: Collective Bargaining Agreements, Commission on Spanish Speaking Affairs, Foster Care, Higher Education Programs, Minority-Owned and Women-Owned Businesses, Minority Student Grants, Single Business Tax Credit, and Special Needs Adoption. Some of these programs may be preserved by eliminating reference to race, sex, color, ethnicity, and national origin and expanding the program's scope or eligibility criteria using race/gender-neutral terms. (Refer to Section VI., Identification of State Laws That May Be Affected By the Adoption of Proposal 2; and VIII., Recommendations for Maintaining Diversity and Economic Growth in State Government in the Aftermath of Proposal 2, for more details.)
7. Due to time limitations, we were unable to meet with state institutions of higher learning or public school districts, nor have we conducted in-depth review of their policies, procedures, or programs.
8. Proposal 2, by its own terms, has limited application. It only applies to government institutions. It has no application in the private sector.

⁴ *Hunter v. Erickson*, 393 U.S. 385 (1969)

⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003)

9. As expressly articulated in the language of the amendment, Proposal 2 only applies to government institutions in the areas of contracts, employment, and education. It does not apply to the general operations of government.
10. Under President Lyndon B. Johnson's September 28, 1965 Executive Order No. 11246, (Attachment 3) the U.S. government has mandated diversity in employment for federal contractors, including state agencies, doing contractual work for a federal agency, if that contractor or subcontractor receives over fifty thousand dollars (\$50,000) in federal funds for contractual work, and has over fifty (50) employees. This federal diversity requirement is not nullified or invalidated by Proposal 2.
11. By its own terms, Proposal 2 does not apply to any government institution that receives *any* federal funding now, or which plans to establish a program that would make it *eligible* to receive federal funding in the *future*, if the federal appropriation has affirmative action requirements attached to it.
12. Proposal 2 does not apply to bona fide occupational qualifications ("BFOQ") based on sex.
13. Any court judgment, or judicial consent decree in force before December 23, 2006, is not affected by Proposal 2.
14. State agencies are permitted and in some instances are required, to keep statistics on race and sex.
15. State agencies may conduct outreach to groups based on race, sex, color, ethnicity, or national origin so long as that outreach is not exclusive to groups based on race, sex, color, ethnicity, or national origin.
16. If the preference is based on disability Proposal 2 does not apply.
17. Proposal 2 does not apply to religious organizations or programs.

FACT SHEET

By Executive Directive 2006-07, Jennifer M. Granholm, Governor of the State of Michigan, directed the Michigan Civil Rights Commission (“MCRC”) to investigate the impact of the adoption of Proposal 06-02 and to issue a report detailing its findings and specific recommendations. The MCRC carried out its task of reviewing Proposal 2 and its application to state government through the Michigan Department of Civil Rights (“MDCR”). The MDCR interviewed seventeen (17) state departments and six (6) other state agencies and contacted the Michigan Council for University Presidents in preparation for this assessment and Report.

The Commission made the following findings:

1. Proposal 2 does not end equal opportunity or the critical pursuit of diversity and inclusion in the State of Michigan. Neither does it mean that the terms “race” or “sex” are banished from the official state vocabulary, as it relates to the state’s decision-making process.
2. The MDCR reviewed 45 state programs relating to the operation of public employment, public education, and public contracting that may be affected by the adoption of Proposal 2. As a result of this review, we believe eight (8), or 18% of the programs may be in jeopardy. The programs are: Collective Bargaining Agreements, Commission on Spanish Speaking Affairs, Foster Care, Higher Education Programs, Minority-Owned and Women-Owned Businesses, Minority Student Grants, Single Business Tax Credit, and Special Needs Adoption. Some of these programs may be preserved by eliminating reference to race, sex, color, ethnicity, and national origin and expanding the program’s scope or eligibility criteria using race/gender-neutral terms. (Refer to Section VI., Identification of State Laws That May Be Affected By the Adoption of Proposal 2; and VIII., Recommendations for Maintaining Diversity and Economic Growth in State Government in the Aftermath of Proposal 2, for more details.)
3. The Report provides a number of recommendations as to how to expand and promote diversity in state government while operating within the parameters of Proposal 2. The ballot language for Proposal 2 stated that it would ban affirmative action programs that gave preferential treatment to groups or individuals based on race, sex, color, ethnicity, or

national origin. Many affirmative action plans or programs do not contain preferences and would therefore not be in violation of Proposal 2.

Impact On State Agencies

With the exception of MDOT and DEQ none of the state departments or agencies, interviewed uses an affirmative action program or plan that grants “preferential treatment” in its employment or contracting decisions. Both MDOT and DEQ have federal contracts that require the use of affirmative action programs.

We found that there are tremendous opportunities through expanded outreach to ensure that the workforce as well as the contractor vendor base and public education in general are reflective of the diversity that defines our state.

Proposal 2 and Economic Development

Michigan is projected to rank as the 48th largest among the 50 states and District of Columbia in the number of persons gained through net internal migration between 1995 and 2025, losing 1.1 million people.¹ All growth in Michigan in the next 20 years will be realized in minority populations.² Minority populations are overwhelmingly underrepresented in higher education. In so far as educational attainment is strongly correlated with average earned wages it is safe to presume that if all ethnic groups had the same educational attainment and earnings as whites, total personal income in Michigan would be approximately \$3.9 billion higher, and the state would realize an estimated \$1.4 billion in additional tax revenues.³

The workforce in Michigan, and the country as a whole, is becoming increasingly diverse. The racial and ethnic groups driving this expanded diversity are the fastest growing and least educated segments of the population. If current trends continue and Michigan does not improve the education of all racial and ethnic groups, the skills of the workforce will not keep pace with the demands of the knowledge economy, and the incomes of Michigan residents will erode precipitously over the next two decades. The impact of failing to educate the fastest

¹ U.S. Bureau of the Census, Population Division, Population Paper Listing #47, Michigan Population Projections: 1995 to 2025, 3.

² Michigan Population Projections: 1995-2025, 6.

³ National Center for Public Policy and Higher Education, Measuring Up Slide Show (2004).

growing segments of the population will manifest as long-term structural problems associated with transitioning Michigan's economy to one centered around knowledge based industries with global stature.

**A Diverse Workforce is Necessary if Michigan Hopes
to Transition into a Knowledge-Based Economy**

Today's private companies demand that colleges and universities provide a highly diverse, educated workforce in order to compete in the global economy. The ability of American businesses to thrive in the 21st century depends in large part on our nation's response to the increasingly global and interconnected nature of the world economy. Cross-cultural competence is the single most important attribute for ensuring effective performance in a global marketplace in the future.⁴

Currently, more than \$600 billion in purchasing power is generated by minorities and more than one-third of all new entrants to the workforce are persons of color.⁵ This amount of money, and the influence it exerts over future market success, will only continue to increase through growth in minority populations.

Many of Michigan's economic leaders (General Motors, Daimler Chrysler, Kellogg, TRW, Steelcase, and Whirlpool) demonstrated the need for diversity in the Michigan economy by filing amicus briefs on behalf of the University of Michigan's affirmative action programs.⁶ These companies, whose economic futures are coupled with Michigan's as a whole, stated that they rely on affirmative action programs and have provided substantial financial support for minorities in higher education in order to fulfill their own need for a diverse workforce.⁷ These companies advocate pro-diversity programs because they require the talent and creativity of a workforce that is as diverse as the world around it, without which, they cannot succeed in the 21st century.⁸

The greatest hope for the future of Michigan's economy is to embrace education driven, and knowledge based industries of the 21st century. As evidenced by expanding minority

⁴ K. Bikson & S.A. Law, Rand Report on Global Preparedness and Human Resources: College and Corporate Perspective, (1994).

⁵ William G. Bowen, *The Compelling Need for Diversity in Higher Education*, *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.).

⁶ *Grutter v. Bollinger*, "Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents," 1-2 (2003).

⁷ Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, 9.

⁸ Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, 5.

populations, the correlative relationship between average wages earned and increasing educational attainment, and the recognition by private business of the need to increase their cross-cultural competence, minority involvement serves as a powerful tool for Michigan to succeed in this economic transition, especially given the diverse composition of the state itself.

Recommendations For Maintaining Diversity And Economic Growth In State Government Following Proposal 2

The following are the highlights of the recommendations created as part of the report. We believe that adoption of these recommendations would greatly assist the state in improving its necessary commitment to diversity. The recommendations are categorized by (A) Legislative, (B) Public Employment, (C) Public Education, (D) Public Contracting, and (E) Administrative.

A. Legislative

1. In the event that a Michigan state or federal court finds that petition circulators have engaged in a pattern of fraud to deceive voters about the meaning of a proposed state-wide ballot proposal, such a finding should disqualify the proposed petition from being placed on the ballot.
2. The State Legislature should define “preference” as a decision based **solely** on race, sex, color, ethnicity or national origin.
3. It is recommended that programs be established that address the problem of comparable worth in the State of Michigan where women, on average, earn 67 cents for every dollar that a man earns. Every local governmental jurisdiction should be required to examine whether its pay structures are giving “preferences” to male employees.

Specific legislative measures are recommended for certain statutes in order to ensure that compliance with Proposal 2 is achieved. The details of these recommendations are set forth in the Report.

B. Public Employment

1. The state Civil Service Commission (“CSC”) should employ an expanded outreach for its notification of state job openings beyond the state website and traditionally-relied upon postings at the requesting state agency. Outreach could be accomplished

- by developing a list of minority, women and ethnic organizations and making sure that these organizations are not being excluded from state job-opening notifications.
2. The CSC should conduct at least semi-annual “Employment Conferences,” around the state, to explain how the state hiring process works, and what jobs will likely become available.
 3. The CSC should continue to keep statistics on state employees including minority and female employment, and examine this data on a county or regional basis to determine whether minorities and women are being excluded from or under-utilized in certain job categories (i.e. managerial positions), and if this is the case, to develop outreach plans to and partnerships with minority and women business organizations to develop best practices in this area.
 4. By July 1, 2007 each state agency shall establish a new and current EEO plan modeled after the Office of Federal Contract Compliance Recommended Affirmative Action Guideline Plan.

C. Public Education

1. Expansion of outreach to, and partnerships with, K-12 schools to increase preparation for all students and address the achievement gap between students from different backgrounds.
2. Expansion of the criteria employed to define academic achievement to include qualitative factors such as improvement in academic performance.
3. Expansion of admission/enrollment criteria to encompass a broader range of personal talents and achievements.
4. Establish a consortium of higher educational institutions in the state, operating from the Governor down, to ensure that institutions work together to accomplish the same goals in promoting diversity and otherwise preparing for the 21st century economy.

D. Public Contracting

1. It is recommended that DMB establish a Supplier Diversity Program in the State of Michigan with goals and objectives to ensure fair and equal opportunities of participation for all vendor groups.

2. DMB should develop a definition for a category of businesses called Diversity Business Enterprises (“DBEs”). In doing so DMB should consult with federal agencies, and other states to determine best practices in this area.
3. The DBE definition should included businesses that are
 - a. Michigan-based,
 - b. from “Economically Distressed” areas of the state,
 - c. Small Business Enterprises (“SBEs”) – this term should be defined through best practices and experience at the federal and state level, including a cap on the amount of average annual gross receipts and number of employees, and
 - d. “Emerging Business Enterprises” – this term should be defined through best practices and experience at the federal and state level, and in particular consultation with the state Treasurers office, for firms in the financial services sector.
4. Once a category for DBEs has been adopted, it should be incorporated into DMB purchasing policies for all purchases of \$25,000 or more, and state agencies should use the DBE policy, when appropriate, for all of their purchases of less that \$25,000.
5. Conduct semi-annual Matchmaking Conferences to build relationships between large businesses and small businesses to promote sub-contracting opportunities.

E. Administrative

1. Each state agency shall develop a Diversity Strategy and Plan (“DSP”) that is incorporated within the state agency’s Strategic Plan. The DSP shall include quantitative data and benchmarks for Diversity Competency. The state agency’s top management’s annual performance evaluation shall be based – in part – on his or her Diversity Competency.⁹
2. Each state agency should have an Equal Employment Opportunity (“EEO”) Coordinator who reports to the department director and is responsible for, among other things, producing a diversity manual and conducting diversity training on an annual basis.

⁹ U.S. GAO Study on Diversity Management and Practices (issued to U.S. Sen. Joe Lieberman).

3. It is recommended that each state agency be required to develop written outreach plans to enhance diversity in their educational, contracting, and hiring decisions. These plans should be coordinated with DMB and CSC. The final outreach plans should be submitted for review and consideration, to the Governor's office by May 1, 2007.
4. DMB and CSC should coordinate their Equal Opportunity Plans with MDCR, and those three (3) departments will jointly report to the Governor on their progress, on a quarterly basis.
5. It is recommended that each state department determine whether it is eligible for additional federal funding and adhere to all affirmative action requirements necessary for eligibility.